IN THE

SUPREME COURT

OF THE UNITED STATES

EDWARD H. LOVE,

Plaintiff in Error,

vs.

ANNIE FLAHIVE AND ANDREW J. LANSING,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

This is a suit in equity, originally brought by plaintiff in error in the District Court of Missoula County, Montana, to have defendant in error Flahive declared to hold the legal title to certain lands in Missoula county aforesaid, in trust for plaintiff in error.

The complaint of plaintiff was demurred to by defendants on the alleged ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and judgment entered for defendant in error upon the complaint and the demurrer.

An appeal was then taken by plaintiff to the Supreme Court of Montana, being the highest court of that state, whereupon the decision of the District Court was affirmed. The case now comes before this court upon a writ of error to the said Supreme Court of Montana.

The allegations of the complaint being admitted by the demurrer, we will refer to the facts alleged in the complaint and the exhibits thereto attached and made a part thereof, as facts found.

STATEMENT OF FACTS.

In May, 1882, Edward H. Love, Plaintiff in Error, who was qualified to enter and receive patent for a homestead, settled upon the East Half of the Southeast Quarter of Section 22, and the East Half of the Northeast Quarter of Section 27, all in Township 20 North of Range 26 West, in Missoula County, Montana, being contiguous legal subdivisions, and forming a strip of land one mile in length and one-fourth of a mile wide, for the purpose in good faith of entering the same and obtaining a United States patent therefor as a homestead, said land being at that time unsurveyed public land, and subject to settlement, occupancy and improvement, "and that the plaintiff in the year aforesaid, as he of right might and could do, erected a dwelling house thereon, and built a good and substantial fence around said land, enclosing the same, with the exception of the north twenty acres thereof, and continuously occupied, possessed and improved the same up to the date hereinafter mentioned."

Record, pp. 1, 2 and 5.

Also on page 7 of the Record, in the findings of fact of the Commissioner: "It would appear that at the time he initiated his claim in May, 1882, he was entitled to 160 acres as against the government; that he went to work at once and built him a house, and enclosed the whole of the land claimed by him so far as he was able to at that time, with the exception of N. ½ of the north forty; that Flahive himself worked for Love upon the fence that enclosed the land mentioned without making any claim whatever for any portion of it."

The Township was thereafter duly surveyed and the plats

of survey thereof were returned to the U. S. District Land Office at Helena, Montana, December 11th, 1888.

See Record p. 2, Par. III of Complaint.

On January 2nd, 1889, Love prepared and filed his application to enter said subdivisions as a homestead. Said application was rejected by the officers of the local land office as to the portion lying in Section 27, on the ground that it was claimed by the Northern Pacific Railroad Company. Plaintiff Love appealed from this action of the local office, to the Commissioner of the General Land Office, who rejected the claim of the company and sustained plaintiff's application, which decision of the Commissioner is still in full force and effect.

See Record, p. 2.

On June 14th, 1889, one Michael Flahive made application to enter the Southeast Quarter of Section 22, which included the north eighty acres of plaintiff's claim aforesaid, including sixty acres of the land fenced, occupied and improved by said plaintiff Love. The officers of the local land office found that the applications of Flahive and of Love were simultaneously filed on June 14th, 1889.

See Par. IV of Complaint, p. 2 of Record.

On August 14th, 1890, a hearing was had in the land office at Helena upon these applications, and a decision rendered awarding the land to plaintiff Love. Michael Flahive appealed from this decision to the Commissioner of the General Land Office, and on July 26, 1892, the decision of the local office was affirmed. Exhibit A is a copy of the opinion handed down by the Commissioner in that case.

See Record, pp. 3 and 7.

Michael Flahive appealed from the latter decision to the Secretary of the Interior, by whom it was affirmed, and the land again awarded to Plaintiff Love.

See Record, p. 3.

On January 30, 1895, a motion for a rehearing was made by Annie Flahive, defendant in error, widow of Michael Flahive (the latter having died during the pendency of the contest in the land office) on the alleged ground that "Love had parted with any title and interest in the land in controversy by a sale of said premises to one Rundall, who had in turn sold to Flahive." A rehearing was granted on that question alone, in the land office at Helena, and on June 4th, 1895, the land was again given to Love. On appeal to the Commissioner this decision was again sustained, but on a motion for review, the Commissioner reversed his decision, and awarded the land to Flahive upon the ground that Love was estopped by the alleged sale from claiming the land. This decision was affirmed by the Secretary of the Interior on December 26, 1896.

See Record, p. 3, also pp. 10 to 15.

Edward H. Love made a motion for review of the decision of December 26, 1896, which motion was denied by the Secretary March 15, 1897.

See Exhibit B, pp. 8 and 9 of Record.

It appears from Exhibit B that Love offered to show that his application was in reality filed as early as April 5, 1889, but that the Secretary refused to consider the point, upon the alleged ground of estoppel. See Record, pp. 8 and 9.

It appears that Flahive settled upon the West Half of the Southeast Quarter of Section 22 in October, 1884. Record, p. 7.

The first claim made by Flahive to the land in dispute as against Love, was in 1886, when Love attempted to fence the north twenty acres. He claimed it then by purchase from Rundall, who in turn claimed it by purchase from Love in September, 1883.

Record, pp. 7 and 10 to 15.

The hearing at which the evidence referred to in Exhibit C was taken was had for the sole purpose of determining the question of the alleged sale.

Record, p. 10.

Patent issued to Annie Flahive for the Southeast Quarter of Section 22 in December, 1899.

Record, p. 5.

The complaint also alleges that the acts of the land department in awarding the land to Flahive was done under a mistaken construction of the Acts of Congress applicable thereto, entitled "Pre-emption and Homestead," and the acts amendatory and supplemental thereto.

Record, p. 3.

That the right, title and priority of plaintiff and defendant Annie Flahive depend entirely upon the construction and interpretation of the United States Statutes aforesaid; that by reason of the error and mistake of the Land Department in construing and interpreting said statutes the land was erroneously awarded to defendant Flahive; that plaintiff does not know the necessary cost of obtaining patent which is chargeable to plaintiff, but that he tenders the same into Court upon the same being ascertained; that no action of ejectment has been commenced against the plaintiff to recover possession of said premises on account of said patent or otherwise, notwithstanding his actual possession as aforesaid since 1882; that immediahely upon the issuance of patent to defendant this plaintiff took steps to have this action brought; that no material or substantial change had occurred in respect to said premises and that he has diligently prosecuted his claim and equities and verily believes he is entitled to the relief demanded, and that said plaintiff claims and as-

serts his title and right under the United States Statutes aforesaid.

Record, p. 5.

That on January 22, 1900, Annie Flahive made and executed a mortgage to Andrew J. Lansing upon the Southeast Quarter of Section 22 aforesaid.

Record pp. 5 and 6.

Plaintiff Love filed his complaint in this action on December 3, 1900, setting up the foregoing facts, and asking that Annie Flahive be adjudged to hold the legal title to the East half of the Southeast Quarter of Section 22 aforesaid in trust for plaintiff, and to have the amount due said Lansing under said mortgage determined, and the same satisfied out of the West half of said Quarter Section.

Complaint, pp. 1 to 15 of Record.

Defendants demurred to the complaint on the alleged ground that said complaint did not state a cause of action.

Record, p. 16.

The demurrer was by the Court sustained, and the default of plaintiff for not amending entered.

Record, p. 16.

Thereafter, on December 6th, 1904, judgment was rendered for defendants.

Record, pp. 16 and 17.

An appeal was then taken to the Supreme Court of Montana, and the judgment of the District Court was thereupon affirmed.

Record, 17 to 22.

A writ of error was then prosecuted to this Court.

Record, pp 22 to 32.

JURISDICTION OF COURTS OF EQUITY.

It is well settled that where the land department awards land to the wrong person by reason of an erroneous construction of the law, the patentee becomes a trustee of the legal title for the person who was upon a correct construction of the law entitled to the land; and a court of equity has jurisdiction to determine the question of title between such persons and decree a transfer of the legal title to the person to whom the land department would have awarded the land had it not erred in its construction of the law.

Johnson vs. Towsley, 13 Wall, 72.
Sanford vs. Sanford, 139 U. S. 647.
Baldwin vs. Stark, 107 U. S. 463-465.
Hawley vs. Diller, 178 U. S. 489.
Samson vs. Smiley, 13 Wall 91.

The record shows that upon all the hearings the Land Department found that Plaintiff Love was the prior settler and had complied with the law so as to entitle him to patent. The Department, however, afterward took the land away from him upon the alleged ground of estoppel by reason of an alleged sale. This we contend was error, and it is one of the questions this Court is asked to pass upon.

THE FEDERAL QUESTION.

This Court has jurisdiction of the case, without doubt. Love, plaintiff in error, claimed title to the land in controversy under the United States Statutes (see record p. 5). That claim was denied by the highest court of the state of Montana. This is determinative of the jurisdiction of this Court.

In N. P. R. R. Co. vs. Colburn, 164 U. S. 385, which involved similar questions, the Court said:

"If the company had relied upon this decision (referring to the decision of the land department) as its defense against the action, and the Court had decided *in favor* of its validity (of the title claimed by the Company), a different conclusion might be reached. The judgment of the Supreme Court of the State was *adverse* to the claim of title made by the Company. It denied to it the right which it asserted under the Act of Congress, and a Federal question is therefore presented."

The determination of this case involves the construction of the preemption and homestead laws and acts amendatory and supplemental thereto.

The decision of the case upon any ground calls for the construction of United States Statutes, and a Federal question is without doubt presented.

Samson vs. Smiley, 13 Wall. 91.

Johnson vs. Towsley, 13 Wall. 72.

Kansas Pac. Ry. Co. vs. Atchison Ry., 112 U. S. 416.

Quinby vs. Conlan, 104 U. S. 420.

Osborne vs. Bank of U. S., 9 Wheat. 738.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Montana erred in holding that plaintiff in error was not and is not entitled to the land involved in this action as first settler under the preemption and homestead laws of the United States.

2. The said Court erred in holding that the action of the District Court of Missoula County, Montana, sustaining the demurrer to the plaintiff's complaint in this action was correct.

3. The said Court erred in holding that said District Court did not err in deciding that the plaintiff's complaint in said action did not state a cause of action.

4. The said Court erred in holding that the action of the District Court of said Missoula County in entering judgment for defendant and against plaintiff in said action, upon said complaint and the demurrer thereto was correct.

5. The said Court erred in holding that it was immaterial whether the homestead application of plaintiff was in fact filed before that of defendant Flahive or not.

6. The said Court erred in not treating the application of plaintiff Love as having been filed April 5th, 1889, and that of Flahive as having been filed June 14th, 1889.

7. The said Court erred in holding that the alleged sale from Love to Rundall and from Rundall to Flahive estopped plaintiff in error from afterwards asserting title to the land in controversy, and in holding that said alleged sale operated to defeat the operation of the preemption and homestead laws of the United States.

8. The said Supreme Court erred in holding that the land department committed no error in construing the law in allowing the alleged estoppel alone to defeat the operation of the statute, and in holding that it operated to prevent plaintiff from making application after the forfeiture of Flahive.

9. The said Court erred in holding that the plaintiff in error ever abandoned said lands or any part thereof.

10. The said Court erred in holding that defendants or either of them, or their predecessors in interest, or the predecessors in interest of either of them, ever acquired any right to said land superior to those of this plaintiff in error.

11. That the said Court erred in holding that defendants in error or either of them ever were or are now entitled to and are the owners of said lands or any part thereof.

12. The said Court erred in holding that under simultaneous filings by Love and Flahive that Flahive was entitled to the land in controversy or any part thereof.

13. The said Court erred in not holding that under simultaneous filings Love was entitled to the land, it appearing by the complaint and being admitted by the demurrer that plaintiff in error was in possession of the land at the time and after the forfeiture of Flahive.

14. The said Court erred in hold that the Land Department committed no error in refusing upon the hearing before the Secretary of the Interior to make a finding of the relative dates of the filing of the homestead applications of Love and of Flahive.

15. The Supreme Court of Montana erred in holding that the alleged sale affected the relations of the parties, it being conceded that Love did no act toward giving up any of his possessory rights.

The contentions to be urged in this argument may appropriately be stated and argued in the following order:

I.

The Land Department had no authority to make any finding as to the alleged sale.

II.

The alleged sale was null and void, assuming such a sale to have been made.

III.

Love never abandoned the land in dispute, nor was there any disclaimer by him.

IV.

Assuming that the alleged sale by Love operated as an abandonment, then Rundall's sale to Flahive also operated as an abandonment and let in Love's reasserted claim.

V.

Love became an original settler on surveyed land after the 11th day of March, 1889, and as such was entitled to the land under simultaneous filings.

VI.

Love's application should have been treated as filed April 5, 1889, as a matter of law.

Sections 2257 to 2288 inclusive of the Revised Statutes of the United States gave the right of preemption, and prescribed the limitations and mode of its exercise.

All facts necessary to establish Love's right to the land being admitted, except as to the effect of the transaction between him and Rundall, it will be unnecessary to here recite all the statutes upon which his right is based. The sections with which we are particularly concerned are Sections 2259, 2263, 2265, 2266, and 2273, and the Act of May 14, 1880, read as follows:

Section 2259, U. S. R. S., 1878, provides:

> "Section 2259. Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as rquired by the naturalization laws, who has made, or hereafter makes, a settlement in person on the public lands subject to preemption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land."

Section 2263 provides:

"Sec. 2263. Prior to any entries being made under and by virtue of the provisions of section 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior; *and all assignments and transfers of the right hereby secured prior to the issuing of the patent, shall be null and void.*"

"Sec. 2265. Every claimant under the preemption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the law.

"Sec. 2266. In regard to settlements which are authorized upon unsurveyed lands, the preemption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such preemption settlement."

Section 3 of the Act of May 14, 1880, reads as follows:

"Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether *surveyed or unsurveyed,* with the intention of claiming the same under the homestead laws, shall be allowed the same time to file

his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws."

I.

The first question to be considered is whether the land department had authority to make any findings with reference to the alleged sale. The hearing of March 29, 1895, (Record, pp. 10-15), was for the sole purpose of taking testimony upon that question. (Record, p. 10.)

If the final findings based upon that hearing were without jurisdiction, then all findings upon that point must be disregarded, and the complaint being sufficient without question after such findings are eliminated, plaintiff in error is entitled to a reversal without going further into the case.

The land department undoubtedly has authority to make such findings of fact as are necessary in the determination of the one question which was committed to it by the Acts of Congress, namely, who had made the first settlement upon the land and otherwise complied with the law so as to be entitled to patent.

But its authority ends there. Being created for the purpose of performing certain enumerated duties, and its judicial powers being defined by statute, its jurisdiction is limited to the power expressly granted. Its authority in land contest cases is defined by Section 2273, U. S. R. S., which reads as follows:

"Sec. 2273. When two or more persons settle on the same tract of land, *the right of preemption shall*

be in him who made the first settlement, provided such person conforms to the other provision of the law; and all questions as to the *right of preemption* arising between different settlers shall be determined by the register and receiver of the district within which the land is situated."

This clearly limits the scope of its authority to the single proposition, who made the first settlement and conformed to the other provision of the law, to-wit, occupied and improved the land.

The land department found repeatedly that Love made the first settlement and conformed to the other provision of the law, which finding has never been reversed. Right there the jurisdiction of the land department ended, and the patent should have been issued to Love upon that finding. When the rehearing was ordered upon the ground of the alleged sale, the department acted without authority, and any findings made upon that or subsequent hearings were void for want of jurisdiction, and are not binding upon the Courts. The only ground upon which the Department had authority to grant a further hearing would have been that of fraud or mistake in the former finding as to settlement and compliance with the law. This was not pretended to be the basis of the motion, but it is expressly founded upon the allegation that Love was estopped from asserting *the rights which he acquired by compliance with the law,* by reason of the alleged sale.

This case clearly falls within the principle announced by this Court in Noble vs. Union River Logging R. R., 147 U. S., 176. Mr. Justice Brown, delivering the opinion of the Court, said:

"In Moore vs. Robbins, 96 U. S. 530, 533, it was said directly that it is a part of the daily business of offi-

cers of the Land Department to decide when a party has by purchase, by preemption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the Secretary of the Interior, if taken in time; 'but if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. . . . The functions of that department necessarily cease when the title has passed from the government.'

"We think the case under consideration falls within the latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and *when decided,* and his approval was noted upon the plats, the first section of the act *vested the right of way in the railroad company.* * * * The railroad company became at once vested with a right of property in those lands, of which they can only be deprived by *a proceeding taken directly for that purpose.* If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. * * * A revocation of the approval of the Secretary of the Interior, however, by his successor

in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void."

The same principle applies in this case even though patent did not actually issue to Love. All the facts necessary to entitle him to it had been found, and had become final; and so long as the land was not withdrawn from sale, his right to patent was absolute. Those facts could only be reviewed upon a charge of fraud, and possibly mistake, and then only *in a proceeding instituted for that purpose.* No such proceedings was ever instituted.

The grant passes from the Government to the prior settler; and the sole duty of the Land Department is to determine who *is* the prior settler. In this it acts as the agent of the Government, and has no authority to step between parties and determine alleged rights as between such parties. The Government has no interst in such controversies, as under the provisions of Section 2263, *supra*, they do not affect the right of the prior settler to the land.

It appears very clear to us that the findings of the Department with reference to the alleged sale must be disregarded, and the findings of the Commissioner of July 26, 1892, affirmed by the Secretary of the Interior on February 12, 1894, be given effect.

The authority to pass upon equities claimed to exist between parties is vested in the Courts, and no attempted usurpation of that authority by a special tribunal can in any degree affect the jurisdiction of the Courts in such controversies. As stated by this Court in Garland vs. Wynne, 20 Howard, 6: "Nor do the regulations of the Commissioner of the General Land Office, whereby a party *may* be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court."

Monroe Cattle Co. vs. Becker, 147 U. S. 47, 57.
See also Turner vs. Sawyer, 150 U. S. 587.

If it appears that Love was deprived of the land without due process of law, this Court has jurisdiction to right the wrong. We submit that the action of the Secretary in giving the land to Flahive in the manner shown by the record is without due process.

The land should have been awarded to Love under the valid findings of the Land Department, and then if Flahive had acquired any enforceable rights by the alleged sale, which was the *sole question* upon which the hearing of March 29, 1895, was had, recourse could have been had to the Courts and their rights determined in a proper forum.

The claims of the parties are before this Court, and such disposition may now be made of the land as may appear just and equitable.

The findings of the Land Department that Love was the prior settler and as such was entitled to the land, necessarily included a finding that his occupancy had been so continuous since 1882 as to prevent other settlers from initiating a settlement on the land. The decisions based upon the hearing of March 29, 1895, did not review any part of those findings, nor was the hearing had for that purpose. The findings as to prior and continuous settlement having been finally affirmed by the Secretary of the Interior in favor of Love, all the presumptions were then in his favor. Nothing short of a finding of fact that he was not the prior and continuous settler upon the specific land in dispute would then justify a reversal; and such findings must be made *in a proceeding for the purpose of reviewing the former findings.* Those facts, however, had been repeatedly and finally found in favor of Love; and the

rehearing was granted *solely for the purpose of inquiring about the alleged sale.* In the Secretary's own words: "at this hearing the local officers will confine the testimony to the evidence introduced and that in contravention of the alleged sale of Love to Rundalls."

Record, p. 10.

This expressly prohibits the local officers taking any testimony bearing upon the questions of fact which had already been repeatedly affirmed and had become final.

McDonald vs. Hartman, 19 L. D. 551.

The scope of this hearing is thus narrowed down to the question of the sale of the Finley logs as an estoppel, as an intent to abandon, or as a disclaimer. The first was without the jurisdiction of the Land Department; the second if admitted was insufficient, without the finding that the former findings of fact were erroneous, and a new finding of *actual* abandonment, neither of which could be made at that hearing; and the third is negatived by the former and final finding of fact that Love had settled upon, inhabited and continuously occupied and improved the land from May, 1882, to the time of the hearing.

As before suggested, the Department had jurisdiction only to make findings of fact; and certainly it could not be said that the findings of fact shown in the record justify the decision of the Department in finally depriving Love of the land, and as before mentioned, the Department was precluded by its own order from disturbing the former findings of fact, all of which were in Love's favor. The issuance of the patent to Flahive upon any showing which could be permitted or considered at that hearing was without due process of law.

While we do not believe this Court will consider the Secretary's letter of Dec. 26, 1896, for any purpose, yet

if it is deemed that some of the matters there shown are pertinent to this inquiry, then in view of the fact that there are no specific findings in that letter, this Court can look to the evidence contained in the record (pp. 10 to 15), and make its own findings; but we do not believe that the Court would consider the testimony in its incomplete and fragmentary form. If any pertinent questions are raised, there should be an opportunity to try those questions of fact upon testimony introduced in a proper forum, upon issues regularly joined, instead of upon the *exparte* proof taken by the Land Department in a hearing which we contend was without jurisdiction.

The findings of the Department with reference to the settlement of the parties is contained on page 7 of the record, and are in part as follows:

> "After survey in 1886 when Love attempted to complete his fencing for the north half of the north forty Flahive made threats of violence against him, he, Flahive, having in 1885, cultivated one or two acres of the land on the said forty outside of Love's enclosure.
> "The fact that Love's house was not situated in any portion of the land in controversy is of no moment, for in making his claim as evidenced by his fencing Love intended to include the four forties north and south, that is an aggregate body belonging together, and are not to be separated and Love's house being built on any one forty is considered as constructed upon and belong with the whole of the land to the extent of 160 acres.
>
> *"It is evident from the testimony that Flahive has no right whatever to any portion of the E. ½ of S. E. ¼ of Section 22, T. 20 N. R. 26 W, as against the claim of Love;* his application to make homestead

entry is accordingly rejected to the extent of the said tract subject to appeal within sixty days."

These findings were affirmed by the Secretary of the Interior February 12, 1894.

Now, it may please the Court, that was the time for both parties to introduce all the testimony they could bring forward as to the sole and only questions necessary to be decided, *who was the prior settler and had continuously inhabited and improved the land in dispute.* It was incumbent upon Flahive to show *at that time* if he could that Love was not claiming or occupying the land at the time Flahive settled upon the S. E. ¼ of Sec. 22, either by showing that he had never claimed it, or by showing that he had *abandoned and deserted it and had not reclaimed it before Flahive's settlement, all of which he failed to do, and all those questions were found in favor of Love* as above shown. No hearing was ever had at which those findings could be reopened, and they are therefore final and incontrovertible. Those findings being so, being made upon the only questions necessary for the Department to determine to decide the rights of the parties to patent, the patent should have been issued in accordance therewith. No conclusion made at the subsequent hearing could in any manner affect the rights of Love, since the facts which were vital had all been finally decided in his favor.

In the case of McDonald et al. vs. Hartman et al., 19 L. D. 551, Secretary Smith said:

"There must of necessity be somewhere an end to controversy. Their settlement and preemption rights to these lands involved in the controversy concerning the Sioux half breed scrip locations of Orille Stram were fully considered, and finally determined

by the Department adversely to them in its decision February 18, 1889, *supra*, and in its review of that decision January 28, 1891, (12 L. D. 157), and the introduction into the record of this case of the evidence referred to *can not resurrect and revitalize that dead issue.*

"In your office letter 'H' of March 13, 1891, directing a hearing, it was stated, with reference to Hyde and McDonald, that——

'should they set up any claim as preferred contestants in regard to lots 5 and 6 and SE ¼ of NW ¼ of said section 30, you will allow them full opportunity at the hearing directed herein to present their testimony and be heard with others.'

"This clearly limited the inquiry so far as they were concerned, to their 'claim as preferred contestants' as to their alleged preferred right to enter the lands described in said office letter 'H' * * * and their appeal here from your office decision brings before me for consideration, so far as they are concerned, *that single question and none other.*"

The principle contended for by us is well established in law; and we quote from the above decision merely to show that the practice of the land department itself prevents the consideration of any other than the single question presented on the second hearing, even assuming it has authority to inquire concerning the alleged sale. As in the case cited, the Department was precluded by its own order from inquiring concerning any other question than whether there was a sale, and if so, was it sufficient to transfer the rights claimed by Love to the grantee of Rundall.

But even looking at the testimony (there being no specific finding of fact by the Secretary upon that testimony),

what do we find? Rundall testifies that he bought the *Finley* claim of Love, and that he settled upon it. It appears by his testimony and that of others that his house was on the Northeast quarter of Sec. 22, and that he sold that quarter to Thomas. It does not appear that he ever settled in any other place or built any other house, nor does it appear that he ever had possession of the eighty in dispute or any part of it. Upon settled principles of law, which we will discuss later on, all of this must be disregarded, first, as showing that Love's rights were not affected by the sale of the Finley logs, and second, that the transaction could not affect his rights as against Flahive in face of the unquestioned finding of fact that as between Love and Flahive the former was entitled to the land by virtue of prior settlement and improvement, for Flahive could only date his rights from his own settlement. The finding that Love's settlement was prior to that of Flahive must prevail even though it were admitted that the former had disclaimed the land in 1883. It merely made Love's settlement date after September, 1883, and if Flahive found Love in possession (and the established findings show that he did) and claiming the land at the time the former settled in 1884, he could not inquire into any previous transactions. The finding of the Department upon the questions of prior settlement, inhabitation and improvement is presumed conclusively to have been made with all available evidence before it, and having upon that evidence made a finding that Love was the prior settler, and that finding having become conclusive, the right of Love to the land cannot be disturbed. Love's settlement being found to be prior to Flahive's, it matters not whether it is considered as of May, 1882, or as initiating the day before Flahive's settlement.

Referring again briefly to the record, the Secretary stated on page 14 thereof: "It is evident from Love's statement of the transaction that conceding the sale to be only of logs, he was aware that the land upon which the logs were situated would be claimed by the purchaser of the logs, not by virtue of the sale of the logs, but because it appears that he sold the logs for the reason that the claim of W. F. Finley, upon which the logs were situated was about to be taken by Rundall."

Suppose that is so; what then? It has been conclusively determined that Love initiated a right to the E. ½ of the S. W. ¼ of Sec. 22 in May, 1882; the fact that he sold some logs for Finley, whose claim at that time, before survey, was not so well defined but that he *may* have lapped over onto the ground afterward determined by the survey to be in the above described eighty acre tract, does not in any degree show that Love disclaimed or abandoned that eighty. He knew that Rundall could not take any of Love's 160 acres, and what difference does it make in this case if he did know that Rundall could "jump" Finley's claim?

Nor does the record show that Rundall ever did jump the eighty. So that whatever fears Love may have had, so far as the record shows they were unfounded. And the fact that Rundall's house was built on the N. E. ¼ of Sec. 22, near the center of the quarter, according to witness Merritt (p. 13 of Record), and at least forty rods from the line according to Rundall's own testimony, together with the fact that he afterwards sold that quarter to Thomas, warrant the presumption that the Finley claim was the N. E. ¼ of Sec. 22. This, together with the presumption raised in Love's favor by the findings of fact above referred to at length, leave no room for doubt that patent should have been issued to him.

So that a consideration of the evidence upon which the Secretary confessedly based his conclusion discloses no material fact upon which to base a conclusion that Love ever lost any of his rights under his settlement in 1882. His continuous inhabitation and improvement since that time are incontrovertibly established; and the fact that it appears by the record that any sale he ever made was of the Finley logs strengthens the presumptions in his favor, for it is evident from that that he was not attempting to dispose of any of his own rights. Nor would the fact that he may have known that the purchaser of the logs would claim the land show anything detrimental to his rights; for he knew that his own 160 acres were safe from being jumped.

The questions we have thus far discussed we believe are vital, and earnestly recommend them to the careful consideration of this Court.

II.

THE ALLEGED SALE WAS NULL AND VOID.

Any unexecuted sale of preemption rights, whether they were those of Love or Finley, was, under the provisions of Sec. 2263, supra, absolutely as though it had never been conceived. This appears to us too patent to admit of extended argument.

> "Where particular contracts are inhibited by statute, and if attempted are in positive terms declared "utterly null and void," such contracts will not be enforced."

Gibbs vs. Cons. Gas Co., 130 U. S. 396.
Also Miller vs. Ammon, 145 U. S., 421.
Quinby vs. Conlan, 104 U. S., 420.
Hartman vs. Butterfield Lbr. Co., 199 U. S. 337.

The principle that a void sale is ineffectual for any purpose is well stated in Dung vs. Parker, 52 N. Y. 494:

> "A contract being void by the Statute is void for all purposes. It confers no right and creates no obligation as between the parties to it; and no claim can be founded upon it as against third persons. It cannot be enforced directly or indirectly. The plain intent of the statute is that no person shall be subjected to any liability upon an agreement."

Nor could it be said that the attempted sale, though ineffectual at the time, created an equity which could have been enforced by Flahive after patent, had the patent issued to Love. Being null and void when attempted, it will forever remain so. To hold a contrary doctrine would be to permit that to be enforced indirectly which cannot be enforced directly.

In Anderson vs. Carkins, 135 U. S., 483, this Court held:

> "A contract by a homesteader to convey a portion of the tract when he shall acquire title from the United States is against public policy and void; and it cannot be enforced although a valuable consideration may have passed to the homesteader from the other party."

We submit that any sale, no matter whose rights were attempted to be transferred, did not give rise to any equities between the parties. We have searched the decisions of this Court in vain for anything contrary to this view. Lamb vs. Davenport, 18 Wall. 307, and Stark vs. Starr, 94 U. S. 477, are not in point. In the former case the statute applied in its terms only to *future* sales, and in the latter case the land laws of the United States had not been extended over the Territory of Oregon, where the case arose, at the time of the alleged contracts.

The record shows that Love did not deliver the possession of any portion of his own claim, and so in any event he could not be affected by the alleged sale. The legal status of the parties was unaffected by the transaction.

The alleged sale could not, in any event, of itself and independently of possession, give Rundall the right as against Love to take the patent in his own name, and of course Flahive, merely as Rundall's grantee, could not receive patent as against Love, and the patent should have gone to the latter.

The only way in which either party could claim the land was by actual personal settlement and improvement. The Land Department repeatedly decided that as between Love and Flahive, Love had complied with the law, was the prior settler, and except for the alleged estoppel was entitled to the land. So that the only foundation for the claim of Flahive is the alleged sale. Under the law and the decisions of this Court it is clearly insufficient to support his claim of title.

Love has never given up his physical possession and occupancy of the land, nor would any unexecuted sale give Rundall or Flahive the right to compel him to give it up.

Even assuming that Love attempted to sell a portion of his own claim, yet the law finding him in possession of the land after the transaction will not disturb that possession and he is entitled to the benefit of the rights guaranteed to him by reason thereof. Flahive was bound to know, or is conclusively presumed to have known, of the existence of Section 2263 supra. Hence he could not have been deceived or misled to his prejudice, and for this reason, if for no other, he cannot be heard to assert that Love is estopped.

It does not appear that Flahive did anything to his injury or otherwise upon faith in the alleged sale. If he did

so in fact, he did it with full knowledge of its invalidity, and of the continuously asserted claim of Love, and cannot be heard now to complain.

But does the record even remotely suggest that Love was selling his own land? Most certainly not. It is shown by the evidence of all witnesses that whatever he was selling, land or logs, he was merely acting as agent for Finley. As hereinbefore argued, there is nothing in the showing made to connect him with Finley in such a manner as to estop him with respect to his own land. He would not even be estopped from afterward setting up a claim to the Finley claim did it become *publici juris*. By what course of reasoning could it be shown that he was estopped from claiming land then in his own possession and under fence? In any event, however, the question of estoppel is clearly eliminated from consideration in this case by the law and authorities and for the reasons set forth above.

The question then becomes simple, in view of the continuous actual possession of Love. Settlement, inhabitation and improvement secured to Love the right of preemption (see Sec. 2259, *supra*); and the irrefutable findings of the Department that Love had performed all of these acts and was the prior settler leave no room for the theory of abandonment or disclaimer. Before survey, all that was recognized was the possession, and improvement; and the time for the declaration of intention was when application was made to enter.

We respectfully submit that the question of estoppel has no place in the consideration of this case; that the sale of the Finley logs is not inconsistent with the former finding of the Department that Love settled upon, occupied and

improved 160 acres of unsurveyed land in 1882, which after survey proved to be the land described in the complaint; and that even though it were, it could not affect those former findings, not being made in a proper proceeding for that purpose.

III.

LOVE NEVER ABANDONED THE CLAIM IN DISPUTE, NOR WAS THERE ANY DISCLAIMER.

There is no abandonment by Love shown by the record. Here again the same error is made as previously suggested. It is assumed that Love had attempted to sell his own eighty and that thereby he abandoned it.

The record does not show that there was ever any intention on the part of Love to sell any portion of his claim. On the contrary, the testimony of both parties shows that whatever he sold, land or logs, he sold for Finley; and it certainly could not be said that such a sale evidenced any intention to abandon his own claim.

There are findings in the record that Love settled upon and improved 160 acres of land which after survey proved to be the land described in the complaint. Can those findings be overturned by the fact that he sold some land or logs for W. H. Finley, without an additional finding that the land sold, assuming he sold land, embraced the whole of the disputed eighty, and that he knew it? Assuredly not. The findings of the department had established all the facts necessary to make Love's right to the land perfect; and the burden was upon Flahive to prove, at a time when such proof was pertinent, that Love had intentionally abandoned the land described as the E. ½ of the S. E. ¼ of Sec. 22.

We submit that there is no such proof in the record, and that no such proof could have been introduced at the hearing of March 29, 1895. The question of settlement, inhabitation and improvement had repeatedly been decided in favor of Love, and was not an issue at the latter hearing. The said hearing was had solely to inquire as to the alleged sale, and the testimony was confined to that point.

Even a sale by Love (or attempted sale) of his own land would not have been evidence of an *intention* to abandon, to say nothing of it being a complete abandonment.

> "It is contended that the attempted sale and conveyance by Mrs. Foley to Brannan and others may be regarded as an abandonment by her of the possession of the premises. The elements of abandonment are quite different from those of a sale; and where for any reason a transaction fails as a sale, it cannot be converted into an abandonment."
>
> McLeran vs. Benton, 43 Cal. 476.
>
> Richardson vs. McNulty, 24 Cal. 339.
>
> Morse vs. Commissioners, 19 Mont. 452.

Even supposing the alleged sale was evidence of an *intention* to abandon, the record shows that Love never did actually leave the premises. The intent and act must concur or there is no abandonment.

> "To constitute abandonment the premises must be left vacant without the intention of reclaiming the possession, and open for the occupation of anyone who may choose to enter."
>
> Smith vs. Cushing, 41 Cal. 97.
>
> Stephens vs. Mansfield, 11 Cal. 366.
>
> "The intention to relinquish the possession may have been entertained, not only for a moment, but during the whole period of his possession; but if the

intention was not manifested by leaving the possession vacant, without the intention of returning, there was no abandonment."

Judson vs. Malloy, 40 Cal, 309-310.

Utt vs. Frey (Cal.), 39 Pac. 807.

Hickman vs. Link, 22 S. W. (Mo.), 422.

Settlement, inhabitation and improvement is all that the Act of Congress required before the land was offered for sale. No further right than the enjoyment of possession was guaranteed to the settler prior to such time. After the land was proclaimed for sale and the surveys were returned, the one who had performed those acts was guaranteed the right to enter the land as a homestead, and his declaration of intention to claim it as a homestead must be made within a limited time, or his exclusive right would be forfeited. No declaration of intention was required before such time.

To establish abandonment or such a disclaimer as would affect the rights of Love, it would have been necessary to have shown directly *in a proceeding for the purpose of reviewing the former findings* that those findings were erroneous, and that Love had at one time abandoned his possession and disclaimed the land, and that before he reasserted claim to the land the rights of Flahive had attached; and in such a hearing the entire case would necessarily have been opened up, and proof again taken upon the questions of settlement, improvement, and continuous inhabitation with intent to preempt. Then if Flahive showed abandonment in 1883, Love would have had an opportunity to show a reassertion of claim before October, 1884, the date of Flahive's settlement.

No such a finding having been made in such a proceeding in the Land Department, the former findings of fact

which were clearly within the scope of its authority cannot now be questioned, and Love must be awarded the land as the prior settler.

A sale of logs for Finley which proved after survey to have been upon land here claimed by Love is not evidence of a disclaimer by the latter, there being nothing to show that he knew that the logs were on his own land, or that they were on land then or previously claimed by him.

Admitting for the purpose of argument that the sale of the logs was a disclaimer of the land upon which those logs were situated, there is still no reason to extend the operation of such disclaimer further than that. There is nothing in the record to fix the position of the logs closer than that they were on some portion of the north forty. There is nothing to show that they were on any portion of the sixty which Love placed under fence. Nor would the possession of the unfenced twenty by Flahive, even supposing that the fact of his cultivation of an acre or two of it in 1885 is sufficient to show settlement and inhabitation, give Flahive any right to the portion so in the possession of Love. In Hosmer vs. Wallace, 97 U. S. 579, this Court said, per Mr. Justice Field:

> "Settlement, inhabitation and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, *though upon a subsequent survey by the government it prove to be a part of the same sectional subdivision.*"

So that even conceding that Flahive had a superior right to the unfenced twenty acres, that does not give him any right even to the remaining half of the same sectional subdivision, which was at the time of his first settlement in the possession of Love. Love would at least be entitled to the sixty acres.

But Love being in constructive possession of the entire eighty at the time of settlement by Flahive, he is clearly entitled to the whole of the disputed land.

Since the alleged sale is the basis of the rights which are claimed by Flahive against Love, and since the sale was of itself absolutely insufficient to support the claims of Flahive, and since the findings of the Land Department are that Love was the first to settle upon, inhabit and improve the disputed land, it is conclusive of the rights of the parties. The burden was upon Flahive to prove *prior settlement, inhabitation and improvement, at a time when those questions were at issue,* which he did not do; and those matters being peculiarly within the scope of the authority of the Department, and being decided in favor of Love, defendant in error Flahive cannot now be permitted to question those findings.

The theory of abandonment or disclaimer is clearly untenable, even had Love admittedly attempted to sell his own land without delivering possession; but in the light of the facts disclosed by the record we submit that such a theory cannot be considered seriously.

IV.

ASSUMING THAT THE TRANSACTION OPERATED AS AN ABANDONMENT AND LET IN LOVE'S THE PART OF LOVE, THEN RUNDALL'S PRETENDED SALE TO FLAHIVE ALSO OPERATED AS AN ABANDONMENA AND LET IN LOVE'S RE-ASSERTED CLAIM.

It is well settled that where two parties claim the same tract of land upon the public domain, the withdrawal of one of them instantly inures to the benefit of the other, to the exclusion of third parties.

Stone vs. Cowles, 13 L. D. 192.
McGowan vs. McGann, 15 L. D. 542.
Moss vs. Dowman, 176 U. S. 416-417.

Even assuming that Love's rights were suspended by the transaction, the same could be said of Rundall's rights when he made the pretended sale to Flahive, and Love's rights would again attach prior to Flahive's appearance upon the scene.

We find ourselves constantly compelled to resort to a fiction in making our argument. We have to assume that in the face of Love's continuous possession, which is not and cannot be questioned, that the alleged transaction could give anyone else, either Rundall or Flahive, the right to take the land. That this could not be is patent upon its face.

The only way Flahive could acquire a right to the land was by settlement and improvement. He could not acquire any rights by purchase which would be good as against the actual settlement and improvement of Love.

Gonzales vs. French, 164 U. S. 344.
Quinby vs. Conlan, 104 U. S. 425.

In that case the Court spoke as follows:

> "The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require *personal settlement* upon the lands desired and their inhabitation and improvement."

Again, on page 423: "The settlement which the law of Congress will recognize * * * must be personal to the settler, and not that of others who may have conveyed to him."

And the land being in the possession of Love and under

improvement by him, Flahive could not initiate a settlement.

> "To create a right of preemption there must be settlement, inhabitation and improvement, by the preemptor, conditions which cannot be met when the land is in the occupation of another. Settlement, inhabitation and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, though upon a subsequent survey by the government it prove to be a part of the same sectional subdivision. Under the preemption laws, as held in Atherton v. Fowler (96 U. S., 513), the right to make a settlement is to be exercised on unimproved land; and the right to erect a dwelling house is to be exexercised on vacant land. None of these things can be done on land when it is occupied and used by others."
>
> Hosmer vs. Wallace, 97 U. S. 579.

It appears by the record that Rundall never initiated any right to the eighty acres. There was then a year and more in which the claim of Love could attach and still be ahead of Flahive.

Here again the contention urged repeatedly in this brief forces itself upon us. The hearing of March 29th, 1895, was not called for the purpose of determining any question affecting the priority of settlement. That question had been settled finally and for all time,—that Love was the prior settler. The only question contemplated when the hearing was granted was *whether the rights which Love had acquired to the land by reason of his compliance with the law* had been *sold*, and whether Love was *estopped* from denying the right of the grantee of Rundall to the land.

The question of Love's intention to hold the land described in the complaint as his homestead had been decided finally by the Department on former hearings, and that finding, being one of fact within the scope of its authority, cannot be questioned. Under those findings the intent of Love to claim it as his homestead is presumed to have been continuous during all the period intervening between May, 1882, and the date of his application. So that the only question to be determined, is, was there a sale, and if so, was it sufficient to transfer the rights which Love had acquired by his settlement, inhabitation and improvement, to Flahive? There was no justification for attempting to make a finding or a conclusion of law as to abandonment or disclaimer. It would be manifestly unfair to Love to make any such conclusions, even if they were material and proper, that is, to make a conclusion that Love had disclaimed the land in 1883, without giving him an opportunity to show that he had reasserted his rights prior to Flahive's settlement in October, 1884.

But we also contend that the findings of July 26, 1892, show conclusively that at the time Flahive settled upon the S. E. ¼ of Sec. 22, Love was occupying the East half of that quarter *with the intention of making it his homestead.* The question of intent was one of the questions before the department at that time, and it was necessary to decide that Love had continuously occupied and improved the land with that intention at all times from prior to the time of Flahive's settlement down to the time of that hearing. Otherwise the finding could not have been made in Love's favor. The evidence upon which the finding was made not being before this Court, it must be presumed that it was sufficient to satisfy the officers of the facts ultimately found.

But as before suggested, Love's continued intention under the findings would require that in order for the attempted findings in the second hearing to militate against him, that they should show that *at the time of the initiation of the settlement by Flahive* Love had no intention of making it his homestead. The burden was on Flahive to show that; and in the absence of such a showing, the presumption remains that Love had the intention during all the time between 1882 and the filing of his application, with the possible sole exception of the time of the alleged sale. All findings of fact had been in Love's favor; and the burden was upon the other party to show that the disclaimer did actually continue to the time of Flahive's settlement, otherwise, it would be presumed to exist only for the period actually proved. The language of the Secretary was that "It thus appears * * * that this tract of land was not claimed by Love *at the date of the sale,*" etc. (Record, p. 15.) The finding that Love was in possession and claiming the land at the time of Flahive's settlement emasculates any finding as to disclaimer in 1883. But as we have suggested, the Department had no authority to change those findings at that hearing.

But it is only by a stretch of our imagination that we can conceive that there was any suspension of this intention shown by the testimony in the record.

It is clear that the Secretary erred in his conclusions. He adopted the theory that whatever the transaction may have been, whether a sale, abandonment or disclaimer, Love was estopped from now claiming the land.

Assuming his conclusions as to what the transaction was, he erred as to its effect. If it did operate to show that Love had no intention to hold the land as his homestead in September, 1883, it would be either presumed that

his intention was resumed immediately thereafter, or he was entitled to an opportunity to show that he had resumed that intention before the rights of Flahive set in.

We most respectfully submit that the rights of Love attached before Flahive's settlement, under the established findings of the Land Department, and that the finding that as between Love and Flahive the former was the prior settler, with intention to claim the land as a homestead, is conclusive of the rights of the parties here; that the rights of Love are prior and superior to those of Flahive, and that the Department had no right to make any findings altering in any respect the former findings of fact, inasmuch as the latter hearing was not had for that purpose. The only purpose for which that hearing was had was to see if Love had *transferred the rights which had vested in him by virtue of his compliance with the law*, and could not affect his right to the land as against the government. This was also unauthorized, and the conclusions of the Secretary are not binding here.

V.

LOVE BECAME AN ORIGINAL SETTLER ON SURVEYED LAND AFTER THE 11TH DAY OF MARCH, 1889, AND AS SUCH WAS ENTITLED TO THE LAND UNDER SIMULTANEOUS FILINGS.

The construction given Sections 2265 and 2266, supra, by this Court is that under them a prior settler in possession did not forfeit his right absolutely by not filing within three months, but that his claim could only be defeated by a settlement and *prior application* by another.

Johnson vs. Towsley, 13 Wall. 90-91.

On May 14, 1880, Congress passed an act making these

sections applicable to settlements on *surveyed* public lands. Section 3 of said Act reads as follows:

> "That any settler who has settled, or shall hereafter settle, on any of the public lands of the United States, whether *surveyed or unsurveyed,* with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws."
>
> 21 U. S. Stat. at Large, 140.

In this Act Congress adopted the construction theretofore placed upon sections 2265 and 2266, supra. So that Love being in possession at the expiration of three months from the return of the plats of survey, to-wit, March 11, 1889, and no filing being made by Flahive prior to that time, he (Love) then became a prior settler on *surveyed* land. Flahive then stood in no better position than a next settler, and as such was required to file first.

This is without doubt the true construction to be placed upon the Act of May 14, 1880, and under simultaneous filings we respectfully submit that Love is clearly entitled to the land.

VI.

LOVE'S APPLICATION SHOULD HAVE BEEN TREATED AS FILED AS EARLY AS APRIL 5th, 1889, AS A MATTER OF LAW.

We come now to the consideration of a question which we believe must be decided in favor of Love, and if so decided is without doubt vital.

It appears from the record that on January 2nd, 1889, Love prepared his application and presented the same to the land officials for filing, but that the said application was rejected because of the claim of t he Northern Pacific Railroad Company. Upon appeal from the action of the local officials, however, plaintiff's application was sustained. (Record, p. 2.)

It further appears that at the hearing of August 28th, 1890, the district land office found that Love's application was filed June 14th, 1889, that being the date upon which the application of Flahive was filed. It appears that the date of filing had not been endorsed upon Love's application (see Record, pp. 2, 10 and 14).

Love offered to show, upon a motion for rehearing, that the application bore the following endorsement, claiming that the application was filed as early as April 5th, 1889:

> "Received April 5, 1889, and rejected as to the E. ½ of the N. E. ¼ of Sec. 27, T. 20 N. R. 26 W., because the same is within the forty mile limits of the grant to the Northern Pacific Railroad Company, the withdrawal for the benefit of which took effect February 21, 1872; notice given (name illegible), attorney, personally, and thirty days allowed for appeal."
>
> "S. W. LANGHORNE, Register."

Plaintiff also offered other records of the Land Office to substantiate this claim. (See Record, p. 9.)

Secretary Bliss, in passing upon this question, used the following language:

> "It has not been deemed necessary to verify these contentions of counsel. *Assuming them to be true, and that the application of Love was in fact made April* 5, 1889, *and that the application of Flahive was made subsequently thereto, to wit, on June* 14, 1889,

there does not appear to be any sufficient reason for disturbing the decision hereinbefore made in this cause. That decision was made upon the ground that the sale by Love to Rundall therein referred to operated as an estoppel to the assertion of claim by Love to the tract upon which were situated the Finley logs.

"And that being true, the fact that his application was made prior to that of Flahive could not inure to his advantage. If he were estopped from asserting rights under the applications simultaneously made with that of Flahive, he was unquestionably estopped from asserting rights under an application made two months previous."

(Record, p. 9.)

The error of the Secretary appears to us so manifest as to need no argument. Love could claim the land after the expiration of three months from Dec. 11, 1888, without a filing by Flahive, even assuming that the latter had the preferential rights during those three months. After March 11th, 1889, the land was open to the claim of any person who was in a situation to file, and if Love filed as early as April 5th, 1889, he was undoubtedly entitled to the land for that reason alone, the application of Flahive being unquestioned as being filed June 14, 1889.

Even assuming the alleged estoppel existed during the preferential period between December 11th, 1888, and March 11th, 1889, it ceased as soon as it ceased to protect Flahive. The land was after the latter date *publici juris,* and any qualified person could claim it, and Love would be in as favorable a position at least as a "next settler." We contend, however, that he stood in a more favorable position, as heretofore argued.

We do not find that this point has been passed upon by

this Court, but it was passed upon by the Supreme Court of the State of Montana in the case of McDermott Mining Co. vs. McDermott, 27 Mont. 150-151.

In that case, eliminating all questions of fraud, it was held that a locator of a mining claim who sold his interest under his location was not estopped, after a forfeiture by his vendee and the relocation by a third party, from purchasing from the relocator and setting up this title against his former grantee. That this principle is correct we believe cannot be doubted.

It therefore follows that the refusal of the Secretary to make a finding as to the date of filing was based upon an erroneous construction of the law. By his own language he conceived that the finding asked for would make no difference, "the fact that his application was made prior to that of Flahive could not inure to his advantage." (Record, p. 9.)

This brings us down to the consideration of the facts alleged concerning the date of filing, and the legal conclusions deducible therefrom.

It is well settled that if a Government officer charged with the duty of filing certain papers refuses to file a paper when the same is presented, and it is afterward determined that the person presenting it was entitled to have it filed at the time of such presentation, it will be treated as having been so filed.

The general rule is stated in Lytle vs. Arkansas, 9 Howard, 333:

> "It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his rights by the misconduct or neglect of a public officer, the law will protect him."

Shepley vs. Cowan, 91 U. S., 331, is a case which touches the one at bar at all four corners. It was there held that:

> "Where a party has settled upon public land with a view to acquire a right of preemption, the land being open to settlement, his right thus initiated is not prejudiced by a refusal of the local officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from sale."

See also Duluth vs. Roy, 173 U. S., 590-1.

Ard vs. Brandon, 156 U. S., 537.

The Supreme Court of the State of Montana applied to this point the principle that upon questions of fact within its jurisdiction the decisions of the Land Department are final, and said that "what the evidence before them was does not appear." (Record, p. 21.)

What evidence was before it not appearing, it will be presumed that *all* the evidence was before it, including the endorsement upon the application showing its receipt April 5, 1889, as well as the order of the Commissioner reversing the action of the district land office in rejecting the application when so presented. The District Land Office must certainly be deemed to take notice of its own files, at least in the same case under consideration, and especially of the orders directed to it by the Commissioner of the General Land Office affirming or reversing the decisions of the local office upon appeal.

Ward's Heirs vs. Laborroque, 22 L. D., 229.

The principle being established by the cases cited that the date of presentation must be considered as the date of filing when necessary to protect the rights of a party, how else could that question be brought before this Court than as it is here presented? There being an unexplained finding by the Land Department as to the date of filing, according to the Supreme Court of Montana the question

of error would be buried, and the rights of the plaintiff shut out, not because he was not entitled to the land or that the error itself is not reviewable, but because the Land Department had intentionally or accidentally made its decision in such a manner that the point could not be afterward raised.

The allegations of counsel in Exhibit B, being a part of the complaint, are deemed to be re-alleged here, and for the purposes of the demurrer must be admitted. The complaint elsewhere alleges that the application was presented and sustained on appeal. (Record, p. 2.) This must also be admitted for the purposes of the demurrer. There being no finding of fact by the Land Department as to date of *presentation*, but only of *filing*, the former fact is open to proof, and if it is really as contended by counsel for Love, fairly and squarely raises the proposition of law heretofore repeatedly decided by this Court, that Love's application is entitled to be treated as filed April 5, 1889, that is, the date of presentation.

The error alleged does not come under the head of errors of law in determining the weight of evidence. The allegations of the complaint present two facts: First, that the application was in the hands of the Department April 5th, 1889, and by them rejected. Second, that on appeal, the right of Love to have his application filed upon the date he had presented it was established.

The question then raised is, did the Department err in finding the date of filing as of June 14, 1889, instead of April 5, 1889, as a matter of law?

We must assume upon the facts presented by the record that the Department found the date of filing upon the theory that the document was deemed filed only *at the date of presentation after the determination of the appeal.*

The question of law is undoubtedly properly before this

Court. The theory adopted by the Supreme Court of Montana makes the right to invoke the rule dependent upon accident; in fact, if it is the true theory, we are at a loss to know how the question could *ever* be brought before the court. When a finding is made as to the date of filing, unless the question may be raised as presented here, the error of the Department could never be reviewed.

If the question could not be raised as here presented, the rule could never have been established; as it would have been impossible to get it before this Court. The fact that the decisions in the cases cited were made is conclusive proof that the question can be raised.

The question is then narrowed down to this proposition: Assuming that Love's application *was* in the hands of the land officials on April 5, 1889, and that Flahive's application was filed on June 14, 1889, was Love entitled to the land? That the answer of this Court will be in the affirmative we see no reason to doubt.

If the application of Love is treated as filed April 5, 1889, Love's position is absolutely unassailable. His actual possession is shown. Let his claim date from 1882, from the date of his quarrel with Flahive in 1886, or from January 2nd, 1889, when he prepared his application, or as a settler on *surveyed* land on March 11, 1889; in any event his application made two months before Flahive gives him the land without the suggestion of a doubt. But as before argued, the findings of the land department establish his intention as well as other necessary facts as antedating Flahive's settlement, which is conclusive.

Nor could the delay in raising the question of filing make any difference. It was nearly six years after the applications of the parties were filed before the hearing as to the alleged sale was asked for and granted. The

land had been continuously awarded to Love until that time, and on Dec. 26, 1896, the question of filing was raised by Love. It does not appear that anyone was injured by the delay. The situation of the parties was still the same as at the date of the first hearing, and the contest was still pending. The question becoming, by the later rulings of the Department, material for the first time, was immediately insisted upon by Love.

Moreover, this being a Court of equity, the rights of the parties is the sole issue; and the plaintiff not being barred by any rule of practice, and it appearing that Flahive was not injured by the delay, it is plain that this question can now be considered without affecting prejudicially the rights of defendant in error. Further, the only ground Secretary Bliss gave for not granting the hearing upon that point was that the estoppel shut Love out regardless of the date of his filing.

We respectfully urge that for the purposes of this case the application of Love must be considered as filed as early as April 5, 1889, and that the patent should have gone to him upon that application.

Before closing this argument we wish to emphasize our first contention, to which we attach particular importance.

The findings of the district land office upon the first hearing, at which testimony was taken as to settlement, improvement, and continuous inhabitation with the intention *in good faith*, of appropriating the land described in the complaint as a homestead, were that *in all these respects Love had so complied with the law as to be entitled to the land, as against the claim of Flahive.*

That meant that Love's claim was *in esse* at the time Flahive attempted to settle, and continued to exist down

to the date of the hearing. Being in existence at that time, it matters not whether it was the same claim initiated in May, 1882, or a claim originating only the day before Flahive's settlement.

Even admitting all that the Land Department attempted to draw from the second hearing as to the suspension of his claim in 1883; yet in view of the findings that Love was entitled to the land as prior settler, against Flahive, and it being conclusively presumed that all the evidence as to *the existence of the claim at the date of the latter's settlement* was before the officers, the theory that Love disclaimed in 1883 has no weight.

At the second hearing there was no question raised as to the existence or non-existence of a claim by Love later than September, 1883; it being the theory of the Secretary that the disclaimer in 1883 precluded the subsequent assertion of a claim.

At the first hearing, when proof of the existence or non-existence of a claim by Love *at the date of Flahive's settlement was an issue*, and being the *only* hearing at which it was an isssue, and that question being vital to the claims of the parties, the finding in favor of Love upon that point is the rock against which all the later adverse rulings of the Department beat in vain, and upon which is founded the unquestionable right of this plaintiff in error to have his claim to the disputed land confirmed by this Court.

If Flahive could have proven at that hearing that Love was not claiming the land at the date he (Flahive) settled in 1884, the finding would have been different; but failing to show that, at the only time when the question was up, and the finding being that Love *was* claiming it at that time, without which finding the decision in favor of Love would have been impossible, there is no room for

doubt that Love's claim antedates that of defendant in error, and plaintiff must be given the decision.

The only showing that Flahive ever initiated a settlement upon any portion of the eighty in dispute is that he cultivated an acre or two of the unfenced twenty in 1885. That is all. That it is insufficient to establish a right of preemption is proved by the mere statement of the proposition.

Nor could he initiate a right to land in the possession of Love. Any attempt to do so would be a trespass, and no rights can be initiated by a trespass.

Atherton vs. Fowler, 96 U. S. 513.

It appears that the only ground upon which the land was given to Flahive was by virtue of the alleged sale.

The only findings in the record as to a claim by Flahive as against Love is contained in Exhibit A, page 7 of the Record. The Secretary said:

> "That Flahive himself worked for Love upon the fence that enclosed the land mentioned without making any claim whatever for any portion of it.
>
> "After survey in 1886, when Love attempted to complete his fencing for the north half of the north forty Flahive made threats of violence against him, he, Flahive, having in 1885, cultivated one or two acres of the land on the said forty outside of Love's enclosure."

The finding of the Secretary as to Flahive helping with the fence, being in view of all the evidence and of the claim of sale, would warrant the inference that his assistance had been rendered *after* the alleged sale; and if that is so, it follows without argument that there was a reassertion of claim by Love with the knowledge of Flahive, and

Love's rights are perfect. But this is merely cumulative, since the rights of Love have a solid foundation upon the points already discussed.

We respectfully submit that upon the record and the authorities, it appears that the Department had no authority to disturb the original findings of fact at the second hearing; that even admitting all that was contended as to disclaimer in September, 1883, the finding that Love claimed the land at the date of Flahive's settlement remains; and even if compelled to make his stand upon the final proposition that his application must be treated as filed April 5, 1889, Love is is equity and good conscience entitled to the land in dispute. His settlement upon the tract in 1882, before any other settlement appears to have been made there, entitles him to the most careful consideration of his case, and his early settlement and continued occupancy being admitted, all presumptions are in favor of his right to preempt the land.

This Court stated, in Tarpey vs. Madsen ,178 U. S. 215:

> "The law deals tenderly with one who, in good faith, goes upon public lands, with a view of making a home thereon."

The record shows the best of faith in Love in his settlement upon the land in dispute, and that he occupied it with the intention of making it his home. And we submit most earnestly that an examination of our argument and the authorities cited will convince this Honorable Court that his claim to the land must be sustained, and judgment rendered accordingly, and for all his costs and disbursements in this behalf expended.

Respectfully,

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CHARLES EDMUND PEW,

Solicitors and Counsel for Plaintiff in Error.